Philip Morris U.S.A. *and* International Brotherhood of Firemen and Oilers, Local No. 320, AFL–CIO. Case 9–CA–29288

July 12, 1994

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS STEPHENS AND DEVANEY

On April 23, 1993, Administrative Law Judge William F. Jacobs issued the attached decision. The General Counsel and the Charging Party filed exceptions and supporting briefs, and the Respondent filed a brief in response.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

[1] The Charging Party has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

Vyrone A. Cravanas, Esq., for the General Counsel.
Eric A. Taussig, Esq., of New York, New York, *Fred Hines* of Louisville, Kentucky, and *Mark Macky*, of Richmond, Virginia, for the Respondent.
Don C. Meade, Esq. and *Ronald Ashton*, of Louisville, Kentucky, for the Charging Party.

DECISION

WILLIAM F. JACOBS, Administrative Law Judge. This case[1] was tried before me in Cincinnati, Ohio, on November 12, 1992. The charge was filed by the Union[2] on February 3, 1992, and complaint issued May 15, 1992, alleging that Respondent violated Section 8(a)(1) and (5) of the Act by refusing to bargain with the Union about job bidding procedures for filling vacancies in the oiler classification within the unit of employees represented by the Union. In its answer, duly filed, Respondent denied the commission of any unfair labor practices.

All parties were represented at the hearing and were afforded full opportunity to be heard and to present evidence and argument. Similarly, all parties filed briefs. On the entire record, my observation of the demeanor of the witnesses, and after giving due consideration to the briefs, I make the following

FINDINGS OF FACT[3]

Respondent is engaged in the manufacture of tobacco products at its Louisville, Kentucky facilities. The Union represents the employees in the following unit:

> All employees employed in the operation of Respondent's power plant and oiling/lubrication of machinery, excluding all other employees, and all professional employees, guards and supervisors as defined in the Act.

Employees in the unit consist of two classifications, firemen and oilers. The firemen are responsible for operating and maintaining the boilers, for making sure that they operate in a safe and efficient manner. The oilers are responsible for lubricating the equipment, either with a grease gun or an oil gun. Firemen receive a higher wage than oilers and are considered more skilled.

The Bakery, Confectionery and Tobacco Workers International Union, Local 16T (Tobacco Workers), represents Respondent's production and maintenance employees.

Back in the early 1950s, when an opening occurred in the oiler classification, Respondent filled that opening by hiring experienced oilers off the street. About 1956, however, Louisville enjoyed full employment and there were no experienced oilers available to fill vacancies. Respondent solved the problem by putting the oiler vacancies up for bid among the employees in the production and maintenance unit, believing that although they had no experience as oilers, at least they had familiarity with the machinery and the equipment. Bids were accorded on the basis of seniority so that the more experienced technicians would usually fill the vacancies. There were no problems obtaining bids since, at the time, the oilers' wages were higher than those paid to employees in the production and maintenance unit.

Since 1956, Respondent continued to place oiler vacancies up for bid among the employees in the p & m unit and the practice worked just fine for decades. Firemen, during this period of time, never attempted to bid on a vacant oiler job because the firemen's wages were higher than the oilers' wages.

Three of the employee classifications included within the Tobacco Workers labor agreement were tech-1, tech-2, and tech-3. The employees in the Tech-3 classification were usually those with the most seniority and, therefore, the most experienced. These were the most successful in bidding for the oilers' vacancies.

While still an employee in the p & m unit, prior to successfully bidding on a vacant oiler's job, the bidder was covered by the Tobacco Workers labor agreement. The pension plan contained in that agreement was a flat-rate plan. After a certain period of time in the oiler's position, the bidder no longer was covered by the Tobacco Workers agreement but rather by the Firemen and Oilers agreement. This agreement

[1] The Respondent, Philip Morris U.S.A., (the Respondent), Company, or Employer.

[2] The Charging Party, International Brotherhood of Firemen and Oilers, Local No. 320, AFL–CIO (the Union) or the Firemen and Oilers.

[3] The complaint alleges and the answer admits that the Board has jurisdiction herein and that the Union is a labor organization within the meaning of the Act.

contained a percentage pension plan, rather than a flat rate. It was based on the wage rate of the employee, at the time he retired, including both straight time and overtime.

In the late 1980s and early 1990s, there was a shortage of oilers and so oilers worked a great deal of overtime. Tech-3s, with as much as 30 years of seniority, determined to take advantage of this situation, by successfully bidding on vacant oiler positions just before retiring, working as oilers full time plus overtime, then retiring within a few months, under the Firemen and Oilers' pension plan.

The effect on the Company was economically devastating. Not only did Respondent have to pay the retiree under the more expensive Firemen and Oilers' pension plan but also had to pay the cost of training the new oiler over a period of several weeks, that is the tech-3, who took the retiree's place and also pay the cost of training the new tech-3 who took the new oiler's tech-3 slot. Respondent objected to this revolving door turnover.

Historically, since 1956, the only source of employees to fill vacant oiler positions has not been limited to the tobacco workers. On occasion when there were excess firemen and openings in the oiler classification, Respondent moved the excess firemen into the vacant oiler positions rather than lay them off. In fact, no fireman has ever been laid off.

The right of excess or surplus firemen to fill vacant oiler positions has been covered by successive Firemen and Oilers labor agreements. Under operating procedures, it states:

> 5. Fireman Transfer Rights
>
> A Fireman, who has not held an Oiler classification, may, in the event of a reduction in force, transfer to the oiler classification provided a permanent opening is available. Such Fireman would be placed at the bottom of the Oiler seniority list.

Under seniority, it states:

> (e) If an Oiler is promoted to a Fireman's job, he will be allowed to exercise his seniority in the Oilers only in the event he would be subject to layoff as a Fireman.

In 1987 or 1988, the Respondent's stemmery closed down. Among the employees working there were firemen and oilers. When the Union brought management's attention to the contract and to the right of the two firemen working there to fill open oiler positions rather than face layoff, management agreed. Management, on this occasion, did not put the vacancies up for bid for the tobacco workers to bid on, but transferred the two firemen into the open slots and transferred the oilers to another building. No grievance was filed. When the firemen were transferred to the oilers jobs, they found out for the first time, the amount of overtime available, and that because of the overtime, oilers were earning more money than firemen.

By March 1991, the turnover problem had become critical. Tobacco workers, mostly tech-3s had been bidding on oiler jobs, obtaining them, then within a short time, retiring. The problem persisted for the next several months. In September, the tobacco workers and Respondent began negotiations toward a new contract. Respondent explained the problems of turnover and proposed discontinuing the practice of permitting the tobacco worker employees to bid on oiler jobs and going back to the old system of hiring experienced oilers off the street. Negotiators for the Tobacco Workers reminded management of how long they had been supplying employees to fill the oiler vacancies and argued that they wished to continue to do so.

After 2 weeks of negotiations on this and various other subjects, it was agreed that Respondent would continue to permit the tobacco workers to fill oiler vacancies, just as they had done in the past, and that this provision would be included, in writing, in the contract. And so it was:

> b. Oilers
>
> The Company will continue to fill future openings in the Oiler classification from the membership of the BCTWIU-Local No. 16T.

In order to solve the Respondent's revolving door problem, it was agreed that any tobacco worker who filled an oiler vacancy would have to hold that position for 5 years before becoming eligible for the Firemen and Oilers' pension. Prior to this agreement, the eligibility period had been 30 days. Respondent believed, at the time, that the problem had been resolved.

Firemen and Oilers' representatives were, of course, fully aware, over the years, that oilers were obtained from the tobacco workers unit, and never objected. No fireman had ever bid on an oiler vacancy and the only firemen who ever went from the fireman classification into the oiler classification were those surplus firemen who were in danger of being laid off.

In the months preceding the negotiations between Respondent and the Tobacco Workers, management made the Firemen and Oilers aware that Respondent intended to eliminate the practice of permitting tobacco workers to bid on oiler job vacancies because of the turnover problem. It was a surprise to the Firemen and Oilers, therefore, when, shortly before they were about to enter into negotiations, they were shown a copy of a summary of the Tobacco Workers' new contract providing for a continuance of the practice. Apparently, some firemen employees, aware of the extensive amount of overtime being worked by oilers, were considering bidding on oiler job vacancies, should they occur, and were disappointed that they were apparently precluded from doing so by Respondent's contract with the Tobacco Workers.

Negotiations with the Tobacco Workers concluded in September. Negotiations with the Firemen and Oilers began toward the end of October, lasted over a period of 6 days, and concluded in early November. Each side had a large number of proposals. Spokesmen for Respondent were Manager of Industrial Relations Fred Hines[4] and Assistant Personnel Director Frank Crowe. Ronald Ashton, the business manager for the Firemen and Oilers, represented the Union along with others.

Ashton testified that at the negotiations he submitted a written list of proposals, two of which concerned filling oiler job vacancies. Paragraphs 4 and 5 of his list provide:

> 4. Page 31 #5 Fireman's Transfer Rights. All Firemen shall have the right to bid into the Oiler classification when an opening occurs. All Oilers shall have the right

[4] At times, referred to in the record as Fred Heinz.

to bid into the Fireman classification when an opening occurs.

5. All Firemen and Oilers shall be hired through the Union Hall.

According to Ashton, he offered these proposals on the first day of negotiations and did so in order to stabilize the situation in the oilers' unit. After some discussion about the Union's proposals, Hines and Crowe asked to caucus. Thereafter, they rejoined the union negotiators and informed them that the Company could not agree with the Union's proposals 4 and 5 because it had already agreed to allow all the oilers to come from the tobacco workers unit. Upon being told of Respondent's agreement with the Tobacco Workers on this issue, Ashton contacted the Tobacco Workers' representatives who confirmed that agreement had, indeed, been reached. Upon confirmation that agreement had been reached between the Tobacco Workers and Respondent, Ashton objected to Crowe that the arrangement was illegal because the Firemen and Oilers had not participated in negotiations during which their work had been given away. According to Ashton, Crowe apologized, saying, ''They put us in a box and we didn't have no choice.'' Ashton said that if management had already agreed with the Tobacco Workers that all entry level oilers would be chosen from the tobacco workers' unit, how could Respondent even talk to the Firemen and Oilers about the subject. Crowe admitted that he could not, that there was nothing that could be done about it. This, of course, was Ashton's testimony.

Discussions about job bidding procedures did not end the first day but continued throughout negotiations up to and including the last day. But Respondent never agreed to proposals 4 and 5 and negotiations concluded with a signed agreement without these proposals included. The parties decided that 4 would be the subject of an unfair labor practice charge and the outcome of the NLRB proceedings would determine the issue.

Ashton testified that at no time during the negotiations was the subject of the economic effect of the granting of bidding rights to the Firemen and Oilers introduced into the bargaining. Crowe testified to the contrary and I credit Crowe. According to Crowe, he told the Union, when they made their proposal, that the Company would not agree to having the firemen bid down from a higher skill to a lower one, because the result would be the same kind of revolving door situation that had occurred with the most senior tobacco workers bidding into the oilers unit for 30 days, then retiring. If the firemen were permitted to bid down, it would be the most senior firemen who would get the job. They could remain a short time, work a lot of overtime which would increase their pensions, and could then retire. The retirement would leave a new vacancy which would then be filled by the most senior fireman who wanted the job. Each time a fireman moved into the oilers' unit and retired with an increased pension due to his working increased overtime in the oilers' unit, a new fireman would have to be hired and trained over an approximate 90-day period. Each fireman who obtained an oiler position would, of course, have to undergo at least some training as an oiler.

Although Crowe testified that he discussed the economic effect of the Union's proposal with the Union, he also admitted that he told the Union that the issue had already been decided by the agreement with the Tobacco Workers which had limited Respondent's flexibility. When the Union sought a compromise by having the Company fill oiler vacancies from both the tobacco workers unit and either from the firemen or the Firemen and Oilers' hiring hall, Respondent refused, giving arguments it had given already.

Representatives of the Respondent, on the first day of negotiations, broached the subject of the problem of turnover among employees in the oilers unit. They advised the representatives of the Union of the steps they had taken several weeks before, while negotiating with the Tobacco Workers, and asked if they would agree to requiring the tobacco workers coming into the oilers' unit, to remain 5 years before being able to take advantage of the Firemen and Oilers' pension plan. The Union agreed to this proposal and the provision became part of the new agreement.

Since the close of negotiations in November 1991, there have been additional vacancies in the oilers' unit. These have been filled, in accordance with past practices and with the labor agreement between the Respondent and the Tobacco Workers, by employees in the tobacco workers' unit. Since the conclusion of those negotiations, there has also been a reduction in force in the firemen's unit. As a result, two firemen became surplus. These two, in keeping with past practice, were permitted to transfer into the oilers' unit.

In March 1992, a fireman who was not surplus, bid on a vacancy in the oilers' unit. The Company advised this employee that he could not bid on the job. This employee filed a grievance which was not resolved because the parties determined that this grievance would be resolved in the instant proceeding. As it turned out, this same employee became surplus in June or July and was transferred into the oilers' unit at that time.

The General Counsel and Union take the position that Respondent engaged in surface or sham bargaining because when it entered into negotiations it was bound by the terms of the labor agreement it had already negotiated with the Tobacco Workers which provided that it obtain entry level employees to fill vacancies in the oilers' unit from the ranks of the manufactoring unit represented by the Tobacco Workers and could not give consideration to the Union's proposal to fill such vacancies by permitting firemen to bid down from their positions.

Respondent takes the position that it bargained in good faith with the Union throughout negotiations, that the parties discussed the whole history of how oilers' vacancies had been filled in the past, that they exchanged opinions and explained positions. Respondent emphasizes that no limitations were placed on any of the discussions either as to content or time but the parties nevertheless reached impasse because though Respondent was admittedly limited in its flexibility because of its agreement with the Tobacco Workers, its basis for refusing the Firemen and Oilers' proposal to be permitted to down bid was legitimately founded on economic considerations and Respondent would not have agreed to the Union's proposal even if it had not reached the agreement it had with the Tobacco Workers.

Conclusions

I base my finding that Respondent did not violate Section 8(a)(1) and (5) of the Act on the following factors:

1. The complaint does not allege and I do not find that the negotiations between the Tobacco Workers and the Respondent which resulted in the following contract provision were violative of the Act:

> The Company will continue to fill future openings in the Oiler classification from the membership of the BCTWIU-Local No. 16T.

2. Negotiations between the Firemen and Oilers and the Respondent were conducted over a 6-day period during which numerous proposals were proffered and discussed with no limits as to time or content, the negotiations resulting in a signed collective-bargaining agreement. There was no surface bargaining.

3. The right of firemen to bid on oiler vacancies was discussed at every meeting with Respondent providing legitimate explanations as to its position. There was no change in the position of either party, thus impasse was reached.

4. That impasse had been reached is implicit in the parties' decision that a collective-bargaining agreement should be signed without the inclusion of a provision covering the right of firemen to bid on oiler unit vacancies, with the issue of whether further bargaining is required be left to the Board.

5. All or virtually all cases cited by the General Counsel and the Charging Party involved a condition of employment, once enjoyed by employees in a represented unit, being unilaterally changed or discontinued by an employer. In the instant case the Firemen and Oilers never, in the past, enjoyed the privilege of bidding on vacancies in the oiler unit either as a past practice or as a contractual right. Thus, there was no unilateral change in an existing working condition but rather an attempt, on the part of the Firemen and Oilers, to expand the existing right which it enjoyed, and continues to enjoy, to place firemen in vacant oiler positions only if the firemen are surplus firemen, in order to avoid layoff.

Based on the above considerations, I shall recommend dismissal of the complaint.

CONCLUSIONS OF LAW

1. Respondent is an employer within the meaning of Section 2(2) and is engaged in commerce as defined in Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent has not committed any unfair labor practices alleged in the complaint.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[5]

ORDER

The complaint is dismissed in its entirety.

[5] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.